

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hanover Township et al.,

Petitioners,

v.

Commonwealth of Pennsylvania et al.,

Respondents.

DOCKET NO: 281 MD 2012

2012 MAY 29 A 10:41
COMMONWEALTH COURT
OF PENNSYLVANIA

APPLICATION FOR LEAVE TO INTERVENE

Non-parties, the City of Allentown (“Allentown” or the “City”), the Allentown Commercial and Industrial Development Authority (“ACIDA”) and the Allentown Neighborhood Improvement Zone Development Authority (“ANIZDA”) (collectively, (“Intervenors”) hereby makes this Application, by and through undersigned counsel, to intervene as a respondents pursuant to Pennsylvania Rule of Appellate Procedure 1531(b) and avers in support of this Application as follows:

PARTIES

1. The City of Allentown is a city of the third class in the Commonwealth of Pennsylvania.

2. ACIDA is a municipal authority in Allentown, with offices located at 435 Hamilton Street, Allentown, PA 18101.

3. ANIZDA is a municipal authority in Allentown with offices located at 435 Hamilton Street, Allentown, PA 18101.

FACTS

4. On March 29, 2012, Petitioners filed the above-captioned action seeking to invalidate Article XVI-B of Act 50 of 2009 (the “Act”) as unconstitutional.

5. The Act provides for the establishment of Neighborhood Improvement Zones (“**NIZs**”) “in which a facility or facility complex may be constructed and may borrow funds for the purpose of improvement and development within the neighborhood improvement zone and construction of a facility or facility complex within the zone.” 72 P.S. § 1603-B

6. The Act requires projects within NIZs to be funded, in part, through the earned income taxes (“**EIT**”) collected by “Qualified Business,” or businesses within, or partially within, the NIZ in which the project is being completed. 72 P.S. §§ 1602-B, 1604-B(b).

7. A NIZ has been established within the Intervenor City of Allentown. For several years, plans have been formulated to construct an 8,500 seat hockey arena to host the American Hockey League’s Phantoms, together with integrated parking, hotel and office facilities (the “**Project**”). ANIZDA has recently been formed to carry out the Project as successor to ACIDA, which has already incurred \$55 million of debt in connection with the Project and associated NIZ development.

8. The Intervenor City arranged for the issuance by ANIZDA of approximately \$220,000,000 of revenue bonds (“**Bonds**”) backed by state and local taxes to provide for the financing of the costs of the Project, including repayment of a bridge loan for land acquisition described below. A substantial amount of planning has been done to finalize such financing, including negotiation and execution of a lease with the owner of the Phantoms, assembling a team of finance professionals, developing a debt security structure, preparation of bond documents, presentations to rating agencies, obtaining a tax revenue forecast, creating and organizing ANIZDA and working out arrangements with the Commonwealth for the handling of the NIZ tax revenues which will be pledged to the repayment of the bonds.

9. Demolition on the site of the Project has already been completed, and excavation is in progress. Any substantial delay in the issuance of the Bonds will result in the stoppage of work, and would likely cause a delay of as much as a year in the occupancy of the hockey arena by the Phantoms.

10. ACIDA's \$35 million bridge loan for land acquisition, which was intended to be paid with proceeds of the bonds, was due to be paid on May 1, 2012,

11. In addition, a private developer has guaranteed \$20 million of debt related to the planned construction of office, retail and parking facilities adjacent to the Project.

12. The Bonds are to be repaid with revenue derived in accordance with the Act, and, therefore, in part through the EIT collected by Qualified Businesses.

13. If a judgment is entered in Petitioners' favor, the Project cannot be completed and various parties will be in danger of default on outstanding loans and other legal obligations, because ANIZDA will be unable to issue the Bonds.

14. Petitioners did not name Intervenors, or many other directly interested parties, in their Petition for Review.

ARGUMENT

Summary of the Law on Intervention

15. The Intervenors have a direct, immediate and substantial interest in the outcome of this Action.

16. Rules of Civil Procedure 2326 through 2329 govern intervention in original jurisdiction matters before the Commonwealth Court. *In re Subpoena of Pennsylvania Crime Comm'n*, 309 A.2d 401, 405 (Pa. 1973); 20A G. Ronald Darlington *et al.*, Pennsylvania Appellate Practice at 121 (2011-12 Ed.).

17. Pennsylvania Rule of Civil Procedure 2327 permits intervention, in relevant part, if:

- (3) such person could have joined as an original party in the action or could have been joined therein; or
- (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Intervention is Appropriate Under Rule 2327(3)

18. Not only *could* the Intervenors have been joined in this action, such joinder was *mandatory*, and, absent its participation in this litigation, this Court does not have subject-matter jurisdiction to adjudicate Petitioners' claims.

19. Petitioners are seeking declaratory and injunctive relief.

20. Pursuant to 42 Pa.C.S. § 7540 of the Declaratory Judgments Act, "all persons shall be made parties who have or claim any interests which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

21. The foregoing "statutory language is mandatory and, prior to the enactment of the Declaratory Judgments Act, our Supreme Court had held that a declaratory judgment action will not lie unless all interested parties who could be affected by the judgment are joined." *County of Allegheny v. Commonwealth*, 453 A.2d 1085, 1087 (Pa. Commw. 1983).

22. "A party is generally regarded to be indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *HYK Constr. Co., Inc. v. Smithfield Twp.*, 8 A.3d 1009, 1015 (Pa. Commw. 2010).

23. Courts examine the following four factors when determining whether a party is indispensable: (1) whether the absent parties have a right or interest related to the claims; (2) the

nature of such interest; (3) whether the interest is essential to the merits of the issue; and (4) whether justice can be done without violating the absent parties' due process rights. *Id.*

24. "The failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction." *Id.*

25. In an action involving the entitlement to tax revenue, the entity entitled thereto is an indispensable party. *See Montella v. Berkheimer Assoc.*, 690 A.2d 802, 803-04 (Pa. Commw. 1997) (townships for which debt collector collected taxes were indispensable parties in action by taxpayer against debt collector challenging propriety of taxes). *See also See In re Stout*, 559 A.2d 489, 490-91 (Pa. 1989) (judge permitted to intervene in declaratory judgment action granted where petitioners sought her removal from office and from payroll because judge was an indispensable party).

26. Intervenors believe and therefore aver that this action can jeopardize crucial construction schedules and negatively impact businesses, jobs and millions of investment dollars, all of which are critical to the revitalization of the City of Allentown.

27. Accordingly, the Intervenors are an indispensable party, and, absent intervention, this Court is without subject-matter jurisdiction to adjudicate Petitioners' claims.

Intervention Is Appropriate Under Rule 2327(4)

28. A determination in this Action will profoundly impact the legally enforceable interest of the Intervenors.

29. "[T]he exact boundaries of the 'legally enforceable interest' limitation of Pa. R. Civ. P. 2327(4) are not clear. It owes its origin to the desire of the courts to prevent the curious and meddlesome from interfering with litigation not affecting their rights. The result is a flexible although uncertain rule whose application in a given case calls for the careful exercise of

discretion and a consideration of all the circumstances involved.” *In re Subpoena of Pennsylvania Crime Comm’n*, 309 A.2d at 406.

Rule 2329 Does Not Apply

30. Intervention in this case is mandatory because none of the grounds for refusal of intervention apply.

31. Pennsylvania Rule of Civil Procedure 2329 permits courts to refuse intervention if:

- (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
- (2) the interest of the petitioner is already adequately represented; or
- (3) the petitioner has unduly delayed in making application for intervention or intervention will unduly delay, embarrass or prejudice the trial of the adjudication of the rights of the parties.

32. “[I]f the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.” *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

33. The requirement of subordination and recognition of the propriety of the action requires an intervenor to “take the suit as he finds it.” *Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950). *See also Sell v. Douglas Twp. Zoning Hearing Bd.*, 613 A.2d 162, 164 (Pa. Commw. 1992).

34. The interests of the Intervenor are not represented in this case. While the Commonwealth respondents will presumably argue that the Act is constitutional, they have no

direct interest in ensuring the successful completion of the Project or the critical timing of that completion.

35. Intervenor did not delay in seeking intervention; to the contrary, they have acted promptly after the filing of this Action.

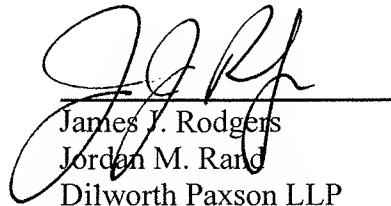
36. Accordingly, intervention in this case is mandatory.

CONCLUSION

37. If permitted to intervene, Respondents will argue that the Act is constitutional.

38. Pursuant to Pennsylvania Rule of Civil Procedure 2328, a copy of the Intervenor's proposed Preliminary Objections to the Petition for Review is attached hereto as Exhibit "A."

WHEREFORE, the City of Allentown respectfully requests that this Court grant this Application for Leave to Intervene.



James J. Rodgers
Jordan M. Rand
Dilworth Paxson LLP
1500 Market Street
Suite 3500E
Philadelphia, PA 19102

Charles P. Gibbons
Buchanan, Ingersoll & Rooney PC
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219

Dated: May 29, 2012

VERIFICATION

I, Sara Hailstone, Director of Community and Economic Development, do hereby verify that the statements made in the attached Application for Leave to Intervene are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

By:

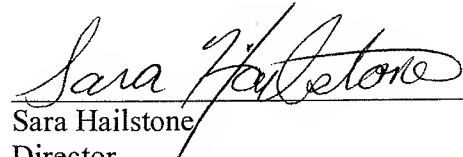

Sara Hailstone
Director
Community and Economic Development

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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**PRELIMINARY OBJECTIONS OF RESPONDENTS THE CITY OF ALLENTOWN,
THE ALLENTOWN COMMERCIAL AND INDUSTRIAL DEVELOPMENT
AUTHORITY, AND THE ALLENTOWN NEIGHBORHOOD IMPROVEMENT ZONE
DEVELOPMENT AUTHORITY**

Respondents The City of Allentown (“**Allentown**”), the Allentown Commercial and Industrial Development Authority (“**ACIDA**”) and the Allentown Neighborhood Improvement Zone Development Authority (“**ANIZDA**”) (collectively, “**Respondents**”), by and through undersigned counsel, submits the following Preliminary Objections to the Petition for Review:

1. Petitioners Hanover Township and Bethlehem Township, together with officials of those municipalities, on March 29, 2012, filed with this Court a Petition for Review challenging the constitutionality of Article XVI-B of The Fiscal Code (72 P.S. § 1601-B *et seq.*) under Pa. Const. art. III, § 32 (relating to special legislation), and Pa. Const. art. VIII, § 1 (relating to uniformity of taxation).

2. Since the filing of the Petition for Review, numerous other municipalities and a school district have been allowed to intervene, thereby becoming petitioners under the Petition for Review.

3. Article XVI-B of the Fiscal Code authorizes the establishment of a Neighborhood Improvement Zone (“**NIZ**”) within a city of the third class for the purpose of fostering economic improvement and development through the creation of certain public financing opportunities.

4. Petitioners aver that Allentown, or a municipal authority created by Allentown, has established a NIZ within Allentown under Article XVI-B of the Fiscal Code.

5. The specific mechanism for improvement and development authorized by Article XVI-B includes the development and construction of a sports facility or facility complex through public financing. *See* 72 P.S. § 1603-B.

6. The financing for the sports facility or facility complex is to be accomplished through the medium of a dedicated Neighborhood Improvement Zone Fund (“**NIZ Fund**”) established within the State Treasury. 72 P.S. § 1604-B.

7. Among the revenue that is required by Article XVI-B to be deposited into the NIZ Fund are local earned income taxes (“**EITs**”) withheld by “qualified businesses” from individuals working within the NIZ.

8. Section 1604-B(b) of the Fiscal Code specifically requires “any entity” collecting a local EIT from within the NIZ to submit to the State Treasurer all of the local taxes as calculated under that statutory provision for deposit in the NIZ Fund. 72 P.S. § 1604-B(b).

9. The funds transferred to the NIZ Fund may be utilized only (i) for payment of debt service on bonds issued for the improvement and development of the NIZ and constructing a sports facility or facility complex, (ii) for payment of debt service on bonds issued to refund those bonds, (iii) to replenish amounts required in any debt service reserve funds established to pay debt service on bonds, and (iv) for payment of capital maintenance and improvement projects for a sports facility or facility complex. *See* 72 P.S. § 1604-B(e).

10. For the purpose of designating an NIZ and constructing a sports facility or facility complex, Article XVI-B of the Fiscal Code authorizes a city to designate or create a municipal authority to serve as the “contracting authority.” *See* 72 P.S. § 1602-B.

11. ANIZDA, established by Allentown, is to be the designated contracting authority for the NIZ established in Allentown and is the successor entity to ACIDA, currently acting as designated contracting authority.

12. The use of the NIZ Fund for its designated purposes is accomplished through an annual transfer of funds by the State Treasurer to the contracting authority, “until the bonds issued to finance and refinance the improvement and development of the [NIZ] and the construction of the facility or facility complex are retired.” 72 P.S. § 1604-B(d)(2).

13. In their Petition for Review, Petitioners have not included as a respondent ANIZDA, ACIDA, or any other authority or entity that might be serving as the contracting authority under Article XVI-B of the Fiscal Code.

14. Petitioners claim that they are harmed by Article XVI-B because EITs withheld from their residents who earn income from qualified businesses within the NIZ are transferred to the NIZ Fund, rather than paid to the municipality.

Preliminary Objection No. 1: Petitioners have failed to join indispensable parties

15. “Generally, an indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without infringing upon those rights.” *Annenberg v. Commonwealth*, 686 A.2d 1380, 1384 (Pa. Commw. Ct. 1996). In addition, “when declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

16. As described in preceding paragraphs of these preliminary objections, Article XVI-B of the Fiscal Code assigns to the “contracting authority” designated by the city principal governmental responsibilities under the statute, including the most important powers and duties relevant to the claims made by Petitioners.

17. In a challenge such as this one to the constitutionality of Article XVI-B of the Fiscal Code, the contracting party is an indispensable party without whose presence the Court lacks jurisdiction.

18. Under Article XVI-B, the contracting authority's powers and duties include the following:

- To designate a neighborhood improvement zone for the purposes of neighborhood improvement and development within the city. *See* 72 P.S. § 1602-B (defining NIZ); 72 P.S. § 1603-B (“The contracting authority may designate a neighborhood improvement zone of not greater than 130 acres in which a facility or facility complex may be constructed.”).
- To borrow funds for the purpose of improvement and development within the NIZ and construction of a facility or facility complex within the zone. *See* 72 P.S. § 1603-B.
- Annually, to receive from the State Treasurer a transfer from the NIZ Fund until the bonds issued to finance and refinance the improvement and development of the NIZ and the construction of the facility or facility complex are retired. *See* 72 P.S. § 1604-B(d)(2).

19. Under Article XVI-B of the Fiscal Code, the EIT revenues that are the subject of Petitioners' suit are required to be deposited by the State Treasurer into the NIZ Fund. *See* 72 P.S. § 1604-B(b), (d)(1).

20. Because only the contracting authority receives payments from the NIZ Fund under Article XVI-B of the Fiscal Code, it is the contracting authority alone that ultimately

receives and disposes of the EIT revenues about which Petitioners complain in their Petition for Review.

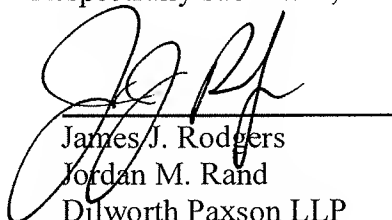
21. Respondents aver that the contracting authority for Allentown will be ANIZDA as successor to ACIDA, currently acting as contracting authority.

22. Because of the central governmental role played by the contracting authority under Article XVI-B of the Fiscal Code – especially relating to the EIT revenues at issue in this suit – Allentown, ACIDA, and ANIZDA are an indispensable parties.

23. In addition, the other taxing authorities (municipalities and school districts) that will be subject to having their EIT retained by the Commonwealth for the purpose of supporting the NIZ financing must also be joined as indispensable parties under the Declaratory Judgment Act. This case does not fit within any of the exceptions to the general rule announced in *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (2003).

WHEREFORE, Respondents respectfully request that this Honorable Court sustain their preliminary objections and dismiss this action for failure to join all indispensable parties.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Rodgers', is written over a horizontal line.


James J. Rodgers
Jordan M. Rand
Dilworth Paxson LLP
1500 Market Street
Suite 3500E
Philadelphia, PA 19102

Charles P. Gibbons
Buchanan, Ingersoll & Rooney PC
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219

Dated: May 29, 2012

VERIFICATION

I, Sara Hailstone, Director of Community and Economic Development, do hereby verify that the statements made in the attached Preliminary Objections of Respondents the City of Allentown, the Allentown Commercial and Industrial Development Authority, and the Allentown Neighborhood Improvement Zone Development Authority are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

By: 
Sara Hailstone
Director
Community and Economic Development

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.

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ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of the City of Allentown, the Allentown Commercial and Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority and any opposition thereto, is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED** and the Petition to Review is hereby **DISMISSED, with prejudice.**

J.

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	:	
Petitioners,	:	
	:	
v.	:	
	:	DOCKET NO: 281 MD 2012
Commonwealth of Pennsylvania et al.,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this _____ day of _____, 2012, upon consideration of the Application for Leave to Intervene of the City of Allentown, the Allentown Commercial and Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority and any opposition thereto, it is hereby ORDERED that the Application is GRANTED.

The Preliminary Objections of the City of Allentown, the Allentown Commercial and Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority are deemed filed as of the date of this Order.

J.

CERTIFICATE OF SERVICE

James J. Rodgers hereby certifies that on May 29, 2012, a copy of the foregoing Application for Leave to Intervene of The City of Allentown, the Allentown Commercial and Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority was served upon the following by first-class mail:

James F. Preston, Esquire
Lisa Ann Pereira, Esquire
Broughal & DeVito, L.L.P.
38 W. Market St.
Bethlehem, PA 18018
Attorneys for Howard L. Kutzler, Hanover Township Bd. of Supervisors, Hanover Township, John J. Finnigan, Jr., Bethlehem Township Bd. of Commissioners, Bethlehem Township, Whitehall-Coplay School District, Whitehall Township

Gary Neil Asteak, Esquire
Asteak Law Offices
726 Walnut St.
Easton, PA 18042
Attorneys for Stockertown Borough, Upper Nazareth Township, Lower Nazareth Township, Bushkill Township

David M. Backenstoe
Northampton County Solicitor's Office
148 Main Street
Hellertown, PA 18055
Attorney for Plainfield Township, Lehigh Township

Charles James Fonzone, Esquire
Christopher W. Gittinger, Esquire
Fonzone & Ashley
33 S Seventh St.
P.O. Box 4180
Allentown, PA 18105
Attorneys for Whitehall Township

Joseph Andrew Zator, III
Zator Law Offices, LLC
4400 Walbert Avenue at Ridgeview Drive
Allentown, PA 18104
Attorney for South Whitehall Township

Scott Everett Coburn
Blank Rome LLP
PA Association of Township Supervisor
4855 Woodland Drive
Enola, PA 17025
Attorney for Pennsylvania State Association of Township Supervisors

Charles Bruno
Pfeiffer, Bruno, Minotti & DeEsch
P.O. Box 468
44 N. Second Street
Easton, PA 18044
Attorney for Palmer Township

Barry L. Treadwell, Jr.
Treadwell Law Offices, P.C.
915 W. Broad Street
2nd Floor
Bethlehem, PA 18018
Attorney for Lower Saucon Township

Joseph Francis Leeson, Jr.
Leeson, Leeson & Leeson
70 E Broad Street
P.O. Box 1426
Bethlehem, PA 18016
*Attorney for East Allen Township, Board of
Supervisors of East Allen Township*

Michael F. Corriere
433 East Broad Street
P.O. Box 1217
Bethlehem, PA 18016
*Attorney for Borough of Hellertown,
Borough of Walnutport*

David J. Ceraul
Law Offices of David J. Ceraul
22 Market Street
Bangor, PA 18013
Attorney for Borough of Bangor

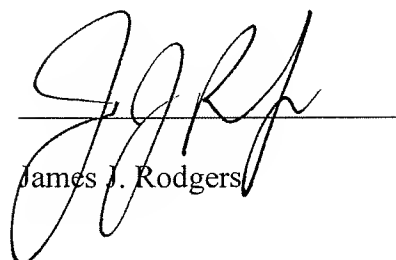
Robert Forman Teplitz
PA Department of the Auditor General
229 Finance Building
Harrisburg, PA 17120
Attorney for Jack Wagner

Amber Lynn Jones
PA Department of the Auditor General
224 Finance Building
Harrisburg, PA 17120
Attorney for Jack Wagner

Christopher B. Craig
Kathryn Maria Cerulli
Treasure Department
127 Finance Building
Harrisburg, PA 17120
Attorney for Robert M. McCord

Gregory Eugene Dunlap
PA Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
*Attorney for Daniel Meuser,
Commonwealth of Pennsylvania*

Gregory R. Neuhauser
PA Office of Attorney General
Office of Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
Attorney for Linda L. Kelly



James J. Rodgers